

Is Bauer the new Bosman? – The implications of the recent jurisprudence of the Court of Justice of the European Union for FIFA

Wojciech Lewandowski

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The question whether the various norms of the *acquis communautaire* may be applied to disputes between private parties was at the heart of many sport rulings of the Court of Justice of the European Union (further referred to as “CJEU” or “the Court”). The *Bosman* ruling, the most renowned ruling of the CJEU relevant to FIFA, dealt with the freedom of movement of workers guaranteed by the Treaty. Now, the CJEU in its *Bauer* ruling confirmed that the fundamental rights enshrined in the Charter might under certain circumstances become horizontally applicable. This post argues that this development of judgments has implications also for sport federations, among them the Fédération International de Football Association (FIFA).

First came *Bosman*...

The influence of actions undertaken by the Union's bodies for the sport sector and the individuals practicing sport activity, both for leisure and for money, in the European Union goes beyond the merely supportive, coordinative, and supplementary catalogue of competences, as can be derived from Art. 6 (e) and Art. 165 para 1 of the [Treaty on the Functioning of the European Union](#) (TFEU). The Court ambitiously raised the level of protection of the rights of the athletes in the European Union via its judicial activity. This process, strung across the decades from [Walrave and Koch](#) until the recent case of [TopFit and Biffi](#), ran parallel to a general progress in ensuring the effectiveness of the rights of individuals in the EU. FIFA has been particularly affected by the renowned [Bosman](#) case, which led to a substantial reform of the FIFA transfer system in order to conform to the right to freedom of movement of Union citizens playing football professionally¹⁾ See J.J. Binder, M. Findlay, [The Effects of the Bosman Ruling on National and Club Teams in Europe](#), Journal of Sports Economics 13(2), July 2008, p. 107-129.. The subsequent developments involved the cases [Simutenkov](#) and [Bernard](#) in which the Court further specified FIFA's subjection to the Treaty provisions guaranteeing freedom of movement of workers in the European Union.

Until now, the sporting jurisprudence of the Court may be framed as a progressive expansion of the horizontal applicability of the primary law of the EU. The Court relied in *Walrave and Koch* on the concept of horizontal applicability of the Treaty provisions prohibiting discrimination on the grounds of nationality to justify the application of then community law in the dispute between athletes and the Union

Cycliste Internationale. Afterwards, the Court further developed the concept of horizontal applicability of the Treaty provisions, this time in the context of Single Market freedoms, in *Bosman*.

The horizontal applicability of EU law remains particularly relevant for FIFA, because the practice of sporting activities, and in particular football, in the European Union is often subjected to a private regulatory regime. National associations, clubs, and athletes are bound by the rules issued by international sport federations. International sport federations, although often forceful and rich, are not states but private associations. Therefore, the relation between athletes and federations is usually of a horizontal nature, although the balance of power is strongly tilted in favor of the governing bodies. This imbalance triggered the Court's jurisprudence on the horizontal application of EU law. Arguably, along the 25 years that passed since the *Bosman* ruling, FIFA, UEFA, and other sport governing bodies operating in Europe have learned that their actions must remain in conformity with general principles of Union law prohibiting discrimination on the grounds of nationality or impeding the freedom of movement of EU athletes.

...then *Bauer*

The most recent jurisprudence of the Court – in cases [Egenberger](#) (a case of alleged discrimination on grounds of religion included in the job offer issued by the Evangelic Church in Germany) and [Bauer](#) (a case in which the successor of the employee sought for the payment of allowance in lieu for paid annual leave against the private employer) – although not directly referring to athletes – might strengthen FIFA's awareness of yet another significant part of EU law – the horizontal applicability of the rights enshrined in the [Charter of Fundamental Rights of the European Union](#) (Charter). In *Egenberger*, the Court stated that Art. 21 para 1 of the Charter (i.e. the prohibition of discrimination) “is sufficient in itself to confer on individuals a right which they may rely on as such in disputes between them in a field covered by EU law” (in para 76). The Court also noted that the national court has to award “the judicial protection for individuals flowing from Articles 21 and 47 of the Charter” by guaranteeing its full effectiveness through disapplying the contrary provisions of a national law if needed (see para 78-79). However, the court has an obligation to balance competing fundamental rights of both parties to the dispute, so the fundamental rights of one individual are limited by the fundamental rights that may be derived from the Charter by other individuals (see para 80-81).

These remarks were further developed in the *Bauer* ruling. The Court examined the horizontal applicability of the provisions of Art. 31 para 2. of the Charter on the right to paid annual leave and came to the conclusion that this provision is of a mandatory and unconditional character. Consequently, it is sufficient to confer on workers a right “that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter” (see para 80-85). In such a situation, first, the national court should consider national legislation contrary to the fundamental right as inapplicable and, second, the employer cannot rely on that national legislation (para 86). The Court declared that simply because the Charter is in principle addressed to the Member

States and the institutions of the European Union (as provided by the literal wording of the Art. 51 para 1 of the Charter), it did not systematically preclude the application of the provisions of the Charter to relations between private parties. Additionally, private parties might be directly required to comply with certain provisions of the Charter (para 87-89). These conclusions were further reaffirmed in the [Max Planck, Sindicatul](#) and [Cresco](#) rulings. Therefore, it is reasonable to argue that the horizontal applicability has been extended by the Court to the fundamental rights enshrined in the Charter.²⁾ However, see the judgment, [Federación de Servicios de Comisiones Obreras \(CCOO\) v Deutsche Bank SAE](#), where the Court reverted to indicating Member State's obligation to ensure the full effectiveness of the Charter in the dispute among private parties.

But, is *Bauer* the new *Bosman*?

There are various characteristics integral to the European model of sport and the principles governing sporting activity in the European Union that can give rise to sporting disputes warranting the horizontal applicability of fundamental rights. Firstly, the structure of sports governance in Europe, based on the above-mentioned imbalance of power and the monopolistic position of sport federations in the European pyramid of sport, is prone to encouraging the invoking of fundamental rights against private sporting regulations. The uneven relation becomes even more imbalanced in circumstances in which one party is in a position to one-sidedly regulate the rights and freedoms of many actors. The 21st century Leviathan is often a beast of a private nature, and FIFA embodies this development.³⁾ See S. Walkila, [Horizontal Effect of Fundamental Rights in EU Law](#), p. 231-234; E. Frantziou, [The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality](#) ps. 668-677.

The observance of fundamental rights that protect basic rights and freedoms of individuals, which are inseparably attached to them as human beings and result from human dignity, should be uniform across different legal orders, as should be the level of protection granted by them. Therefore, as stated by Walkila and Frantziou, the reason for a uniform protection of fundamental rights, irrespective of the nature of the relation between the parties, is to protect the “integrity, priority and effectiveness” of European Union law and contributes to the fulfillment of the *telos* of the European Union, i.e. building an ever closer Union.⁴⁾ See S. Walkila, *Horizontal Effect...* (*op. cit.*), p. 261-272; E. Frantziou, *The Horizontal Effect...* (*op. cit.*), p. 665-666.

The demand for such a uniform protection of fundamental rights in the European Union is the effect of changes to the character of European integration, as well as social and economic realities, throughout the last 60 years. The European Community, which around the time of the *Walrave and Koch* ruling was hardly integrated economically, has become a constitutionalized Union of common values, freedoms and fundamental rights guaranteed to its citizens.⁵⁾ E. Spaventa, [Should we “harmonize” fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite](#)

[constitutional system](#), “Common Market Law Review” 55, 2018, p. 997-1024; on the constitutionalization of the EU, see A. Rosas, L. Armati, [EU Constitutional Law, An Introduction](#), Hart Publishing, 2018; L. Pech, [The Rule of Law as Constitutional Principle of the European Union](#), Jean Monnet Working Paper 04/09. This should also be reflected in the approach of the European Union to different dimensions of the activity of its citizens – i.e. the protection of fundamental rights in the EU should permeate all spheres of Union law. In the context of sport, what once was “[subject to community law only to the extent of constituting economic activity](#)”, is now “[subject to all the obligations which result from the various provisions of the Treaty](#)” when sporting activity falls within the scope of the Treaty. In *Bauer*, the Court reminded that “the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by EU law” (in para 52).

Moreover, just one year ago FIFA itself in Art. 3 of its [statutes](#) committed to respect human rights and strive to promote the protection of these rights. Therefore I believe that the values of the European Union determined in Art. 2 of [Treaty on European Union](#), as well as the catalogue of fundamental rights enshrined in the Charter are not contravening with values sported by FIFA, as well as with the fundamental goals of modern [Olympism](#). In other words – FIFA and the EU play to the same goal, or at least not opposing ones.

What may vary, however, are the methods by which both organizations strive to reach the declared objectives. The way advanced by the CJEU in *Bauer* is *in principio* addressed to national courts, which should, in their jurisdiction, ensure proper enforcement of the Charter if a particular dispute falls under the scope of EU law – mainly by disapplying the contrary national provisions and giving full effectiveness to the respective provisions of the Charter. Consequently, in theory football players will be able to invoke their fundamental rights enshrined in the Charter against FIFA when they are able to prove that its actions fall under the scope of EU law.

In light of the jurisprudence discussed above, the Charter could for example become relevant for employment cases in football challenging FIFA regulations. Indeed, FIFA regulations may, for example, be challenged not only on the basis of the Directive 2003/88 (which is hardly possible under the actual jurisprudence of the Court) but also (and far more effectively) by invoking Art. 31 para 2 of the Charter. Another example that could lead to a successful case against FIFA rules would be the uneven remuneration for women and men national teams winning the FIFA World Cup – such a practice could be declared contrary to Art. 21 of the Charter. However, due to its extreme novelty, it remains very difficult to assess the potential impact the *Bauer* line of cases could have on FIFA (and more broadly sports private regulators), time and disputes will tell whether it will be a transformative one. Therefore, for the time being, *Bauer* is not (yet) the next *Bosman*.

References

- 1. See J.J. Binder, M. Findlay, The Effects of the Bosman Ruling on National and Club Teams in Europe, *Journal of Sports Economics* 13(2), July 2008, p. 107-129.

- 2. However, see the judgment, *Federación de Servicios de Comisiones Obreras (CCOO) v Deutsche Bank SAE*, where the Court reverted to indicating Member State's obligation to ensure the full effectiveness of the Charter in the dispute among private parties.
- 3. See S. Walkila, *Horizontal Effect of Fundamental Rights in EU Law*, p. 231-234; E. Frantziou, *The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality* ps. 668-677.
- 4. See S. Walkila, *Horizontal Effect...* (op. cit.), p. 261-272; E. Frantziou, *The Horizontal Effect...* (op. cit.), p. 665-666.
- 5. E. Spaventa, *Should we "harmonize" fundamental rights in the EU? Some reflections about minimum standards and fundamental rights protection in the EU composite constitutional system*, "Common Market Law Review" 55, 2018, p. 997-1024; on the constitutionalization of the EU, see A. Rosas, L. Armati, *EU Constitutional Law, An Introduction*, Hart Publishing, 2018; L. Pech, *The Rule of Law as Constitutional Principle of the European Union*, Jean Monnet Working Paper 04/09.

